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IN THE  
**Supreme Court of the United States**  
October Term, 1975

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No. 75-602

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CABOT CORPORATION,

*Appellant,*

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,  
*Appellee.*

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ON APPEAL FROM THE SUPREME COURT OF  
APPEALS OF WEST VIRGINIA

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**MOTION TO DISMISS OR AFFIRM**

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December 10, 1975



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Appellee, The Public Service Commission of West Virginia, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein or in the alternative to affirm the judgment of the Supreme Court of Appeals of West Virginia, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

# **I. THE COMMISSION ORDER INVOLVED AND THE NATURE OF THE CASE.**

The Appellant, Cabot Corporation (hereinafter "Cabot"), is a multi-national corporation which alone, or through its subsidiaries, has plants and operations in the United States and in more than ten foreign countries, with total sales for the fiscal year 1974 of slightly over \$400,000,000. Rather than organize a subsidiary corporation Cabot has established a Gas Marketing Division which operates in West Virginia an intrastate natural gas utility serving some 22,000 residential, commercial and small industrial customers in nine West Virginia counties. This Gas Marketing Division also includes two corporate subsidiaries, Industrial Gas Corporation and Mountain Gas Company, both of which are interstate gas pipeline companies. West Virginia is the only State in which Cabot operates a gas distribution utility and it is the third largest such utility in the State.

On February 1, 1973, Cabot filed with the Public Service Commission of West Virginia (hereinafter "Commission"), pursuant to Chapter 24, Article 2, Section 4 of the West Virginia Code, 1931, as amended<sup>1</sup> (hereinafter "Code"), revised tariff sheets stating an increase of approximately 19% in rates and charges for furnishing gas service to customers throughout West Virginia, to become effective March 19, 1973. Assigning the matter Case No. 7612, the Commission, pursuant to Code 24-2-4, suspended the effective date of the revised tariff sheets until July 6, 1973, when they became effective subject to refund under a \$550,000 bond, and initiated an investigation into the reasonableness of the proposed rates and charges.

<sup>1</sup>Reprinted in Appellant's "Appendix to Jurisdictional Statement" (hereinafter "Appendix") at pp 15a-17a.

Evidentiary hearings were held before the Commission on December 11, 1974, and January 24, 1975, at the close of which the matter was submitted for decision, subject to the filing of briefs. The last brief, Intervenor True Temper Corporation's reply brief, was filed March 31, 1975.

On June 13, 1975, the Commission entered an order<sup>2</sup> which granted Cabot an increase of \$433,961. On July 11, 1975, Cabot filed its Petition for Suspension and Appeal of the aforesaid order with the West Virginia Supreme Court of Appeals, which, after oral argument on July 22, 1975, denied said petition by order entered July 23, 1975.<sup>3</sup> Cabot's appeal to this Court followed.

## **ARGUMENT**

### **II. THE COMMISSION ORDER OF JUNE 13, 1975, DID NOT DEPRIVE CABOT OF ITS PROPERTY WITHOUT JUST COMPENSATION AND THIS CASE DOES NOT PROVIDE A SUBSTANTIAL FEDERAL QUESTION.**

The Appellant alleges in this Appeal that the Commission's order of June 13, 1975, fixing the maximum rates and charges which Appellant's intrastate gas utility operation may charge its customers violates the Fourteenth Amendment. The specific issue is the Commission's calculation of the Appellant's Federal Income Tax liability to be assigned for rate making purposes to its West Virginia utility operation. In the aforesaid order the Commission adopted the staff's method of calculating an effective rate of 12.13536% to be applied to Appellant's taxable income in its West Virginia utility oper-

<sup>2</sup>Appendix at pp 3a-12a.

<sup>3</sup>Appendix at pp 1a-2a.

ation of \$417,690 producing a tax liability of \$50,688. In calculating this effective rate, the staff started with the amount of income taxes actually paid to the Federal Government, an amount reduced by the use of foreign tax credits, and figured the tax saving resulting to the Appellant. This tax saving was then multiplied by the statutory rate of 48% and the product was subtracted from the statutory rate in arriving at the effective rate of 12.13536%. The Appellant argues in this case that the use of anything less than the statutory rate of 48% applied to its West Virginia utility's taxable income is confiscatory.

The Commission believes there is ample authority and precedent for a regulatory Commission to reduce a company's tax allowance in its cost of service to the point where the effective rate is less than the statutory rate in cases where consolidated returns are filed or where the actual tax paid the Federal Government is reduced through the use of various tax credits. In the case of consolidated returns, it was held that the Federal Power Commission acted properly in recognizing savings resulting from an election by affiliated companies to file consolidated income tax returns and limiting the expenses allowed in the cost of service to real expenses. *Federal Power Commission v. United Gas Pipe Line Company*, 386 US 237 (1967).

Finally, we submit that it is not the action of this Commission, but the failure of Cabot to set up a separate subsidiary corporation for its West Virginia utility operation and to have that utility file a separate Federal Tax return that has resulted in Cabot not being allowed a tax rate in its cost of service at the full statutory rate of 48%.

## CONCLUSION

For all the above reasons, Appellee, The Public Service Commission of West Virginia, respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this Appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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December 10, 1975